

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THEODORE J. CROCKER and DEPARTMENT OF THE AIR FORCE,
NORTON AIR FORCE BASE, CA

*Docket No. 02-730; Submitted on the Record;
Issued September 12, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits under 5 U.S.C. § 8113(b) to reflect his loss of wage-earning capacity had he continued to participate in vocational rehabilitation.

On September 18, 1972 appellant, then a 29-year-old aircraft jet engine mechanic, filed a claim for compensation (Form CA-1 & 2), alleging that on that date he sustained a puncture/laceration of the left eye in the performance of his federal duties. The Office accepted appellant's claim for foreign body in the left eye with retinal detachment. On March 12, 1975 the Office issued a schedule award to appellant for a 100 percent permanent loss of use of the left eye covering the period October 24, 1974 to November 16, 1977 inclusive. Compensation benefits for temporary total disability and wage loss were paid. By decision dated October 2, 1981, the Office reduced appellant's compensation due to his ability to earn wages as a telephone solicitor. Appellant's requests for reconsideration of this decision were denied.

On February 19, 1991 appellant was referred to a vocational rehabilitation counselor. By letter dated March 12, 1991, appellant was informed that he had one week to contact the rehabilitation counselor and informed that a disabled employee who refuses to seek suitable work was not entitled to compensation. On May 6, 1991 appellant met with the vocational rehabilitation counselor for an interview. By letter dated May 8, 1991, appellant indicated that he was leaving for Illinois, with regard to a farm that he acquired when his wife's mother passed away. An attempt was made for further vocational screening in January 1995, but this was unsuccessful as appellant was again in Illinois. On March 31, 1995 the Office issued a notice of proposed reduction of compensation, finding the position of farm manager fairly and reasonably represented his wage-earning capacity. On May 18, 1995 the Office issued a final notice of proposed reduction of compensation. Appellant appealed the decision and in a May 8, 1996 decision, the hearing representative determined that the Office's decision was improper because the rating was not based on appellant's actual earnings and because the Office tried to modify his compensation based on his actual earnings as well as on a constructed position and remanded the case to the Office for additional development.

By letter dated August 12, 1997, the Office referred appellant for a further vocational rehabilitation assessment. By letter to appellant dated October 9, 1997, the rehabilitation counselor stated that he would meet appellant at his residence on October 16, 1997 and that appellant was to confirm before that date. This letter was returned to the sender as unclaimed. The Office then wrote appellant a letter dated June 8, 1998, wherein it directed appellant to contact the claims examiner and the rehabilitation counselor within 30 days from the date letter to make a good effort to participate in the rehabilitation effort and that if he did not comply with the instructions within 30 days, "the rehabilitation effort will be terminated and action will be taken to reduce your compensation...." Appellant responded by letter dated July 6, 1998, wherein he alleged that the Office failed to help him with retraining in 1981 and that as a result he pursued other interests and acquired a farm in 1990. He expressed his concern as to the Office's alleged incompetence, negligence and discrimination and requested a lump-sum payment. Appellant wrote another letter on October 3, 1999, wherein he asked the Office to review the pay rate used to calculate his compensation benefits.

By decision dated December 20, 1999, appellant's compensation was reduced to zero on January 2, 2000 for his refusal to participate in the vocational rehabilitation process. The Office noted that the reduction would continue until appellant made a good faith effort to undergo the directed vocational testing or show good cause for not complying, at which time the reduction of compensation would cease.

Appellant disagreed with the Office's decision and requested a hearing. The hearing, originally scheduled for March 27, 2000, was rescheduled as a telephone hearing set for May 24, 2000. However, this hearing was not held due to technical difficulties and the case was reviewed on the written record. Meanwhile, appellant wrote another letter to the Office, dated April 2, 2000, wherein he reiterated his case history, inquired about his Air Force Reserve Pay, his schedule award computation and his entitlement to a lump-sum payment and demanded approval of his request for cataract surgery.

In a decision dated August 16, 2001, the Office hearing representative conducted a review of the written record and determined that appellant had not complied with the vocational rehabilitation efforts by the Office, that appellant had not provided any valid reasons for his refusal to cooperate with the rehabilitation effort and that accordingly, the Office's decision was affirmed. The hearing representative also advised the Office that there was sufficient evidence to establish a connection between appellant's need for cataract surgery and the initial work injury and that, therefore, the Office should advise appellant that the surgery was authorized.

The Board finds that the Office properly reduced appellant's compensation benefits to zero for failing to cooperate in the vocational rehabilitation process.

Section 8113(b) of the Federal Employees' Compensation Act provides:

"If an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under section 8104 of this title, the Secretary, on review under section 8128 of this title and after finding that in the absence of the failure the wage-earning capacity of the individual would probably have substantially increased, may reduce prospectively the monetary compensation of

the individual in accordance with what would probably have been his wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the Secretary.”¹

Section 10.519(b) and (c) of the Office’s regulations provide that if a suitable position is not identified because of the failure or refusal to cooperate in the early but necessary stages of a vocational rehabilitation effort *i.e.*, meeting with nurse, interviews, testing, counseling, functional capacity evaluations or work evaluations, then the Office will assume that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity and will reduce compensation to zero. This reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of the Office.²

In the instant case, several attempts were made to refer appellant to vocational rehabilitation services. Although he initially met with a vocational counselor on May 8, 1991 further appointments were frustrated by the fact that appellant spent much of his time in Illinois, tending his farm. The Office proposed reducing appellant’s compensation due to his income as a farm manager, but this decision was overturned by a hearing representative in the decision of May 8, 1996. The Office attempted to begin the rehabilitation process again by sending appellant a letter indicating that the counselor would meet him at his residence on October 16, 1997, but this letter was returned as unclaimed. The Office then wrote appellant a letter dated June 8, 1998, wherein it directed him to contact the rehabilitation counselor and informed appellant of the consequences if he did not cooperate in vocational rehabilitation efforts. Appellant wrote several letters to the Office wherein he referred to his previous appointment with the rehabilitation counselor and expressed various concerns as to the handling of his claim by the Office. However, appellant failed to show “good cause” for his failure to contact the rehabilitation counselor³ nor did he provide any medical opinion that would indicate that he was unable to participate in the rehabilitative process. As appellant did not cooperate with the vocational rehabilitation process with the exception of one meeting with the counselor on May 6, 1991 he failed to provide any valid reason for his refusal to participate in further vocational rehabilitation efforts and as the Office properly informed appellant of the consequences of his failure to cooperate, this Board finds that the hearing representative properly reduced appellant’s compensation benefits.

¹ 5 U.S.C. § 8104.

² 20 C.F.R. § 10.519(b) and (c).

³ See *Jonathan Gibbs*, 52 ECAB __ (Docket No. 99-361, issued October 2, 2000).

Accordingly, the decision of the Office of Workers' Compensation Programs dated August 16, 2001 is affirmed.

Dated, Washington, DC
September 12, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member